

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GEORGANN SCOTT
Claimant

VS.

STATE OF KANSAS
Respondent

AND

STATE SELF INSURANCE FUND
Insurance Carrier

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Docket No. 1,069,374

ORDER

Respondent requests review of the August 28, 2014, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders. Claimant appears by Bryce D. Benedict of Topeka, Kansas. Respondent and insurance carrier (respondent) appear by Nathan D. Burghart of Lawrence, Kansas.

ISSUES

The Administrative Law Judge (ALJ) found psychological treatment was necessary to cure and relieve the effects of claimant's April 3, 2013, accidental injury. The ALJ awarded a limited period of temporary total disability benefits and ordered respondent to provide psychological treatment.

Respondent contends claimant's alleged psychological injury did not arise out of and in the course of her employment. Respondent maintains the accident was not the prevailing factor in causing claimant's alleged psychological injury, need for psychological treatment, and any disability.

Claimant argues the evidence establishes the prevailing factor causing claimant's psychological injury was her work accident and physical injury. Claimant requests the ALJ's preliminary hearing Order be affirmed.

The issues raised for consideration by the Board are:

1. Did claimant sustain psychological injury arising out of and in the course of her employment, directly traceable to her physical injury?

2. Was the April 3, 2013, accident the prevailing factor causing claimant's alleged psychological injury, need for psychological treatment and any disability?

FINDINGS OF FACT

On April 3, 2013, claimant was employed by respondent as a corrections officer at the Kansas Juvenile Correctional Complex. On that date, claimant was injured when she was "slammed"¹ into a cinder block wall by a resident who was involved in an altercation. She was diagnosed with a concussion and multiple abrasions to her left shoulder. Claimant was seen by a number of physicians, including doctors at St. Francis Hospital, Dr. Mead, Dr. Bear, Dr. Shorten, Dr. Fevurly, Dr. Kobes, Dr. Barnett and Dr. Welch.²

Claimant testified she experiences headaches, short term memory loss, tenseness and anxiety, and difficulty functioning around male residents because she fears she will again be assaulted. Claimant denied having any of these symptoms before her accident. Claimant testified her primary symptom is daily headaches.

According to claimant, she was off work entirely until approximately March 8, 2014. Claimant continues to work for respondent, but in a different capacity than when she was injured.

According to claimant, Dr. Mead, Dr. Shorten, Dr. Welch and Dr. Fevurly provided her with physical therapy and antidepressant and migraine medications. No surgical treatment was offered. Claimant testified she underwent a lumbar puncture procedure, however, there is no evidence she sustained a low back injury in this claim.

Claimant testified she had no preexisting psychological problems. She admitted she attempted suicide when in the eighth grade, but did not undergo psychological counseling or treatment. She did not take antidepressant medication before the April 3, 2013, accident.

On May 12, 2014, claimant was examined, at the request of respondent's medical case manager, by Dr. Chris Fevurly, who is board certified in internal medicine, occupational medicine and as an independent medical examiner. Dr. Fevurly noted from claimant's post-accident medical records:

¹ P.H. Trans. at 8.

² The only medical and psychological evidence consists of the records and reports of Drs. Barnett, Kobes and Fevurly.

[M]ultiple neurology consultations and radiological testing. CT head scans, brain MRIs have all been unremarkable and in general, she has never had any focal neurological deficits but she has had chronic and recurrent severe headaches which have essentially disabled her for nearly one year and she was completely out of the workplace during the one year span due to headaches, cognitive and memory complaints.³

Dr. Fevurly described claimant as a chronically-depressed appearing female. He also noted:

She has also been seen by her primary care doctor at the Potawatomie Health Clinic where she has been started on antidepressants there [sic] about eight to nine months ago and was on Lexapro for quite some time but reportedly stopped doing that for reasons that are not clear to me and she has never received any psychological counseling.⁴

Dr. Fevurly's diagnostic impressions were: (1) remote history of blunt head trauma with alleged post-contusive headaches; (2) situational depression; and (3) cognitive and memory problems that also seemed situational. Dr. Fevurly reported his assessment was suggestive of marked symptom magnification versus intentional misrepresentation that needed to be addressed through neuropsychological testing. The doctor recommended neuropsychological testing to rule out the possibility of traumatic brain injury.

Dr. Fevurly examined claimant again on July 2, 2014. The doctor noted the results of the neuropsychological testing conducted by Dr. Kobes. Dr. Fevurly found no objective abnormalities on physical examination and opined claimant required no further testing or treatment. Dr. Fevurly told claimant that any concussion she may have sustained acutely on April 3, 2013, had resolved and that her ongoing symptoms are most likely explained by intentional misrepresentation or malingering.

Keith J. Kobes, Ph.D., a licensed psychologist, performed a neuropsychological assessment on June 6, 2014, at the request of respondent's nurse case manager. Among the testing results and opinions in Dr. Kobes' narrative report are:

1. Claimant's ASC Effort Assessment showed strong evidence claimant simulated cognitive and memory deficits. Multiple CVLT-II validity indicators suggested claimant simulated memory deficits. The NAB Visual Discrimination Test results were inconsistent with claimant's injury and normal visual discrimination. The MMPI-2-RF showed evidence of non-credible reporting of memory complaints with over-reporting for somatic problems,

³ *Id.*, Resp. Ex. A at 3.

⁴ *Id.* at 4.

malaise, gastrointestinal symptoms, head pain, neurological problems and cognitive problems.

2. Some of claimant's test results were consistent with estimated pre-injury ability levels. However, individuals may feign cognitive deficits in inconsistent or idiosyncratic ways. With evidence of poor effort and simulated memory deficits, the assessments were not considered valid indications of claimant's ability. With the incentive of disability income, a negative response bias, and inconsistency between the nature of the injuries and the objective findings, claimant was considered to be malingering on cognitive deficits.

3. Given his diagnosis of malingering, Dr. Kobes offered no specific treatment recommendations. However, the MMPI-2-RF results showed claimant was likely preoccupied with suicide and death, and at risk for current suicidal ideation and suicide attempts. Claimant admitted to a past attempt, but denied current suicidal thoughts. Claimant might benefit from a psychiatric evaluation.

Dr. Robert W. Barnett, a licensed psychologist, evaluated claimant at her attorney's request, on August 26, 2014, one day before the preliminary hearing. Dr. Barnett produced a two page report that stated: "I am writing this letter as a preliminary part of my report, and will forward a complete report to you [claimant's counsel] when it is finished."⁵

Dr. Barnett reviewed Dr. Kobes' report and noted Dr. Kobes' cognitive based tests indicated some significant deficits that Dr. Kobes did not associate with claimant's work-related head injury. According to Dr. Barnett, even though there were no cognitive measures available of pre-morbid functioning, the deficits were consistent with the sequelae of a head trauma. Anyone who works regularly with clients with disabilities sees a high number of unusual responses, as Dr. Kobes mentioned from claimant's MMPI-2. While malingering was one possible explanation, "interpreted" signs of malingering did not rule out genuine injury or disability.

Dr. Barnett interviewed claimant and administered another MMPI. Her current symptoms of anxiety "appear[ed] to be associated with the sequelae of her trauma."⁶ Dr. Barnett diagnosed Post Traumatic Stress Disorder, mild-to-moderate, with additional symptoms of anxiety. Dr. Barnett concluded claimant was not at maximum medical improvement. He recommended problem-focused psychotherapy by a licensed psychologist or LCSW, with the option of a psychiatric consultation for consideration of psychotropic medication.

⁵ P.H. Trans., Cl. Ex. 1 at 1.

⁶ *Id.* at 2.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b provides in relevant part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508 provides in relevant part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

...

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

...

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given

case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Psychological disorders can be compensable if they are directly traceable to a claimant's physical injury.⁷ The standard for whether a psychological injury, or traumatic neurosis, is compensable under the Workers Compensation Act is that the psychological injury must be directly traceable to a compensable physical injury.⁸ Under the Act applicable to this claim, claimant must also prove the accident is the prevailing factor in causing the psychological injury.⁹

There is evidence supporting the positions of both claimant and respondent. Moreover, there are reasons to believe and disbelieve claimant's testimony and the reports of Drs. Fevurly, Kobes and Barnett. However, in weighing the credibility of all of the evidence in the record, this Board Member finds claimant proved psychological injury directly traceable to the physical injuries she sustained in the April 3, 2013, accident, and that claimant's accident was the prevailing factor in causing her psychological injuries, need for psychological treatment and any resulting disability.

There is no dispute claimant sustained an accident on April 3, 2013, when she was knocked into a concrete wall. The accident caused physical injuries to claimant's head, in the form of a concussion, and left shoulder. As a result of the accident, claimant developed symptoms, including headaches, anxiety, and memory and cognitive issues. Claimant's testimony describing her symptoms is consistent with the histories she provided to the health care providers whose reports are in evidence.

Claimant received no psychological or psychiatric treatment before her accidental injury. Claimant took no anti-depressants or other psychotropic medication before the accident. There is no evidence of any other traumatic physical or psychological episodes, either pre- or post-injury, which might account for the development of claimant's psychological issues.

After the workplace incident, claimant was treated for depression, consisting of the prescription anti-depressant, Lexapro. She also received treatment for chronic and recurrent severe headaches. As a consequence of her injuries, claimant was required to miss almost one year from work.

⁷ *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994); *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl. ¶ 1, 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

⁸ *Gleason v. Samaritan Home*, 260 Kan. 970, 926 P.2d 1349 (1996).

⁹ See *Heyen v. City of Wichita*, No. 1,064,079, 2013 WL 2455722 (Kan. WCAB May 29, 2013); *Jordan-Cain v. State of Kansas*, No. 1,058,565, 2012 WL 3279504 (Kan. WCAB July 12, 2012).

Dr. Fevurly was retained by respondent and, although he is not qualified to render psychological opinions, his comments are material to the issues raised before the Board. Dr. Fevurly's ultimate conclusion was that claimant is essentially a faker and a fraud. However, Dr. Fevurly described claimant as a chronically-depressed appearing female. Dr. Fevurly's diagnostic impressions included situational depression and cognitive and memory problems, also situational in nature. The only "situation" to which Dr. Fevurly could have referred was claimant's accidental injury on April 3, 2013.

The opinions of Dr. Kobes are less than credible. His diagnosis of malingering seems inconsistent with his conclusion that the MMPI-2-RF results showed claimant was likely preoccupied with suicide and death, and was at risk for current suicidal ideation and attempts at suicide. Also inconsistent with Dr. Kobes' notion that claimant is malingering is the doctor's observation that claimant might benefit from a psychiatric evaluation.

It is likewise difficult to place much credence in many of the opinions of Dr. Barnett. He evaluated claimant only one day prior to the preliminary hearing. His preliminary report offered into evidence did not contain a detailed analysis of claimant's psychological status and the cause(s) thereof. The complete report that Dr. Barnett stated would be forthcoming is not in the record. Dr. Barnett's diagnosis of PTSD, a serious psychological condition, rendered some 16 months after the accidental injury, seems questionable.

However, clearly Dr. Barnett concluded claimant sustained psychological consequences, including anxiety, directly traceable to her physical injuries, and that claimant's accident was the prevailing factor in causing her psychological injuries, need for psychological treatment and any disability claimant sustained.

The undersigned Board Member finds claimant proved she sustained psychological injury directly traceable to the physical injuries of April 3, 2013, and that her accident on that date was the prevailing factor in causing her psychological injuries, need for psychological treatment and any disability.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

1. Claimant sustained psychological injury arising out of and in the course of her employment, directly traceable to her physical injury.

¹⁰ K.S.A. 44-534a(a)(2).

2. The April 3, 2013, accident was the prevailing factor causing claimant's psychological injury, need for psychological treatment and any disability.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated August 28, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Rebecca Sanders, Administrative Law Judge